IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.194 OF 2005

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Masood Mohmmed Husain ...Petitioner

v/s.

Gulam Rasul Mohammedali Sheikh

and ors. ...Respondents

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Mr.Sham Diwan with Mr.S.S.Purohit i/b Mr.C.K.Tripathi for the Petitioner.

Mr.P.K.Samdhani with Mr.Chetan Kapadia i/b Kishor Thakordas & Co. for the Respondents.

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CORAM: D.K.DESHMUKH, J.

DATED: 22nd August,2005

P.C.:

1. This is a petition filed under Section 9 of the Arbitration Act. According to the Petitioner, the Petitioner entered into a Deed of Partnership dated 6th September, 2002 constituting a partnership between the Petitioner and the Respondents to carry on business as Builder and Developers in the name and style of M/s.Amber Enterprises. According to the Petitioner, though an application for registration of this partnership was made because of fraud played by the Respondents, partnership was not registered and the partnership of the same name having partners other than the Petitioner has been registered. According to the Petitioner, by letter dated 24th March, 2005 the Petitioner has dissolved the firm. According to the Petitioner, as a consequence of dissolution of the firm, the assets of the firm were required to be distributed. In this petition filed under Section 9 of the Arbitration & Conciliation Act the Petitioner claims an interim order for appointment of the Receiver on the property of the firm.

2. A preliminary objection to the maintainability of this petition has been raised on behalf of the Respondents. According to the Respondents, the partnership of which the Petitioner claims to be a partner and which the Petitioner has dissolved was not a registered firm and therefore an application for dissolution of the firm and for accounts of the firm etc. is not maintainable in view of sub-Section 2A of Section 69 of the Indian Partnership Act.

3. The learned Counsel appearing for the Respondents relying on the judgment of the Constitution Bench of the Supreme Court in the case of Jagdish Chandra Gupta v/s. Kajaria Traders (India) Ltd., 1964 Bom.L.R., 709, and the judgment of the Supreme Court in the case of U.P.State Sugar Corporation Ltd. v/s. Jain Construction Co. and anr., (2004) 7 SCC 332, submits that arbitration proceedings at the instance of the unregistered firm are not maintainable. The learned Counsel, therefore, submits that the present petition under Section 9 of the Arbitration Act is not maintainable. In any case no interim relief can be granted in favour of the Petitioner because the arbitration proceedings in view of the provisions of

Section 69 of the Indian Partnership Act are not maintainable.

4. On behalf of the Petitioner, on the other hand, it is submitted that though it is true that the firm itself is not registered, there was an application made for registration of the firm to the Registrar of the Firms and only because of the inaction of the Respondents, firm could not be registered. It is submitted that as the application for registration of the firm has been made and in case the registration is granted the registration will relate back to the date when agreement was entered into , the arbitration proceedings at the instance of the Petitioners are maintainable. The learned Counsel appearing for the Petitioner relies on the judgment of the Supreme Court in the case of Firm Ashok Traders and anr. v/s. Gurumukh Das Saluja and ors., 2004(1) Arb.LR 141 (SC), as also the judgment of the Division Bench of this court in the case of Ram Nandan Prasad Sinha v/s. K.M. Consultants, AIR 2002 Bombay, page 90.

5. Now, in the light of these rival submissions if the record of the case is perused, it becomes clear

that the firm which has been dissolved and in relation to whose assets arbitral proceedings are contemplated by the petitioner is admittedly an unregistered firm. Provisions of sub-section 1, 2 and 2A and sub-section 3 of Section 69 of the Indian Partnership Act are relevant. The read as under:-

> (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a parter in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.
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> (2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(2-A)No suit to enforce any right for the dissolution of a firm or for accounts of a dissolved firm or any right or power to realise the property of a dissolved firm shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm, unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm:

Provided that the requirement of registration of firm under this sub-section shall not apply to the suits or proceedings instituted by the heirs or legal representatives of the deceased partner of a firm for accounts of a dissolved firm or to realise the property of a dissolved firm.

(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right

arising from a contract, but shall not affect,-

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, or

(b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920 to realise the property of an insolvent partner.

6. It is clear that because of the provisions of Section (2-A), which is added by amendment in Maharashtra, a suit for enforcement of any right for dissolution of a firm and for accounts of a dissolved firm which is not registered is not maintainable. Similar provision is contained in sub-section 1 and 2 of Section 69 in relation to other rights arising from the contract. The Supreme

Court in its judgment in the case of Jagdish Chandra Gupta (supra) considered the provisions of sub-section (3) of Section 69, in relation to an application under Section 8 of the Arbitration Act, 1940 and the Supreme Court has held that an application under Section 8 (2) of the Arbitration Act, 1940 is not maintainable. Relevant observations of the Supreme Court are found at page 728 of the judgment. They read as under:-

> "In our judgment, the words 'other proceedings' in sub-s.(3) must receive their full meaning untramelled by the words 'a claim of set-off'. The latter words neither intend nor can be construed to cut down the generality of the words 'other proceeding'. The sub-section provides for a application of the provisions of sub-ss (1) and (2) to claims of set-off and also to other proceedings of any kind which can properly be said to be for enforcement of any right arising from contract except those expressly mentioned as exceptions in sub-s. (3) and sub-s. (4)."

7. The question that arose for consideration before the Supreme Court in the case of Firm Ashok Traders, referred to above, was whether an application under Section 9 of the Arbitration Act 1996 is maintainable if the partnership is unregistered. It appears from the observations made by the Supreme Court in paragraph 10 of the judgment that the observations made by the Supreme Court about maintainability of section 9 application in relation to unregistered firm are prima facie opinion of the Supreme Court. Paragraph 10 of the judgment reads as under:-

> 10. To begin with, for the controversy centering around the abovesaid two provisions we told the learned counsel for the parties that we are not inclined to go in-depth in the issue inasmuch as a prolonged hearing on the issue and decision thereon may take time and that would have devastating effect on the rights of the parties. The learned counsel for the parties agreed that de hors the issue, the Court may proceed to determine the appeal

> on merits. Yet, we feel duty bound to record at least our prima facie opinion on the issue; lest we should be misunderstood as having side-tracked the same.

8. The Supreme Court has decided this question in paragraph 13 of the judgment. Paragraph 13 reads as under:-

> 13. A & C Act, 1996 is a long leap in the direction of alternate dispute resolution systems. It is based on UNCITRAL Model. The decided cases under the preceding Act of 1940 have to be applied with caution for determining the issues arising for decision under the new Act. An application under Section 9 under the scheme of Arbitration and Conciliation Act is not a suit. Undoubtedly, such application results in initiation of civil proceedings, but can it be said that a party filing an application under Section 9 of the Act is enforcing a right arising from a contract? "Party" is

defined in Clause (h) of sub-section (1) of Section 2 of A & C Act to mean 'a party to an Arbitration agreement'. So, the right conferred by Section 9 is on a party to an Arbitration agreement. The time or the stage for invoking the jurisdiction of Court under Section 9 can be (i) before, or (ii) during Arbitral proceedings, or (iii) at any time after the making of the Arbitral Award but before it is enforced in accordance with Section 36. With the pronouncement of this Court in M/s.Sundaram Finance Ltd. vs. M/s.NEPC India Ltd., AIR 1999 SC, 565 = 1999(1) Arb.LR 305 (SC), the doubts stand clear and set at rest and it is not necessary that Arbitral proceedings must be pending or at least a notice invoking Arbitration clause must have been issued before an application under Section 9 is filed. A little later we will revert again to this topic. For the moment suffice it to say that the right conferred by Section 9 cannot be said to be one arising out of a contract. The qualification which the person invoking

jurisdiction of the Court under Section 9 must possess is of being a 'party' to an Arbitration agreement. A person not party to an Arbitration agreement cannot enter the Court for protection under Section 9. This has relevance only to his locus standi as an applicant. This has nothing to do with the relief which is sought for from the Court or the right which is sought to be canvassed in support of the relief. The reliefs which the Court may allow to a party under Clauses (i) and (ii) of Section 9 flow from the power vesting in the Court exercisable by reference to 'contemplated', pending or 'completed' Arbitral proceedings. The Court is conferred with the same power for making the specified orders as it has for the purpose of and in relation to any proceedings before it though the venue of the proceedings in relation to which the power under Section 9 is sought to be exercised is the Arbitral Tribunal. Under the scheme of A & C Act, the Arbitration Clause is separable from other clauses of the Partnership Deed. The

> Arbitration Clause constitutes an agreement by itself. In short, filing of an application by a party by virtue of its being a party to an Arbitration agreement is for securing a relief which the Court has power to grant before, during or after Arbitral proceedings by virtue of Section 9 of the A & C Act. The relief sought for in an application under Section 9 of A & C Act is neither in a suit nor a right arising from a contract. The right arising from the partnership deed or conferred by the Partnership Act is being enforced in the Arbitral Tribunal, the Court under Section 9 is only formulating interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated. Section 69 of the Partnership Act has no bearing on the right of a party to an Arbitration Clause to file an application under Section 9 of A & C Act.

9. It is clear from paragraph 13 quoted above that the Supreme Court in terms held that if the

partnership is not registered then the application under Section 9 of the Arbitration Act is maintainable, because what is required for the maintainability of an application under Section 9 is a valid arbitration agreement and the Petitioner applying under Section 9 being a party to that agreement. But the Supreme Court in its judgment in Firm Ashok has also held that though an application under Section 9 can be filed even before the commencement of the arbitration proceedings, the party has to satisfy the court about its manifest intention to take recourse to arbitration proceedings. The observations made by the Supreme Court in paragraph 17 of that judgment are relevant. They read as under:-

> 17. There are two other factors which are weighing heavily with us and which we proceed to record. As per the law laid down by this Court in M/s.Sundaram Finance Ltd. (Supra), an application under Section 9 seeking interim relief is maintainable even before commencement of Arbitral proceedings. What does that mean? In

M/s.Sundaram Finance Ltd. (supra) itself the Court has said- "It is true that when an application under Section 9 is filed before the commencement of the Arbitral proceedings there has to be manifest intention on the part of the applicant to take recourse to the Arbitral proceedings". Section 9 permits application being filed in the Court before the commencement of the Arbitral proceedings but the provision does not give any indication of how much before. The word ‘before’ means, inter alia, ‘ahead of in presence or sight of under the consideration or cognizance of’. The two events sought to be interconnected by use of the term ‘before’ must have proximity of relationship by reference to occurrence; the later event proximately following the preceding event as a foreseeable or ‘within sight’ certainly. The party invoking Section 9 may not have actually commenced the Arbitral proceedings but must be able to satisfy the Court that the Arbitral proceedings are actually contemplated or manifestly intended (as M/s.Sundaram

> Finance Ltd. puts it) and are positively going to commence within a reasonable time. What is a reasonable time will depend on the facts and circumstances of each case and the nature of interim relief sought for would itself give an indication thereof. The distance of time must not be such as would destroy the proximity of relationship of the two events between which it exists and elapses. he purpose of enacting Section 9, read in the light of the Model Law and UNCITRAL Rules is to provide interim measures of protection. The order passed by the Court should fall within the meaning of the expression ‘an interim measure of protection’ as distinguished from an all-time or permanent protection.

10. It is clear from the above quoted observations of the Supreme Court that before making an order under Section 9 the Court has to be satisfied that the arbitral proceeding would be taken up by the parties within a reasonable time. It pre-supposes that the arbitral proceedings at the instance of

that party should be maintainable. If satisfaction of the court before granting any relief under Section 9 of the Act, that the party applying for interim measure would take up arbitration proceedings within a reasonable time is necessary, then it goes without saying that the court will also have to be satisfied by that party that arbitral proceedings at its instance are maintainable. In so far as the maintainability of the arbitral proceedings, in the facts and circumstances of the present case, is concerned, the judgment of the Supreme Court in the case of U.P.State Sugar Corporation Ltd. v/s. Jain Construction Co. and another, (2004) 7 SCC 332, is relevant. In that case the Supreme Court has considered the judgment of the Supreme Court in the case of Firm Ashok Traders as also the judgment of the Constitution Bench of the Supreme Court in the case of Jagdish Chandra Gupta and in paragraph 7 the Supreme Court has observed thus:-

> 7. The question as to whether Respondent 1 firm is registered or not is essentially a question of fact. It is true that the

arbitral proceedings would not be maintainable at the instance of an unregistered firm having regard to the mandatory provisions contained in Section 69 of the Indian Partnership Act, 1932. It has been so held in Jagdish Chandra Gupta v. Kajaria Traders (India) Ltd. We may, however, notice that this Court in firm Ashok Traders despite following Jagdish Chandra Gupta held that Section 69 of the Indian Partnership Act would have no bearing on the right of a party to an arbitration clause under Section 9 of the 1996 Act. As correctness or otherwise of the said decision is not in question before us, it is not necessary to say anything in this behalf but suffice it to point out that in the event it is found by the High Court that the learned Civil Judge was wrong in rejecting the application for amendment of the plaint and in fact the respondent firm was registered under the Indian Partnership Act, the question of throwing out the said suit on that ground would not arise. There cannot, however, be

any doubt whatsoever that the firm must be registered at the time of institution of the suit and not later on. (See Delhi Development Authority v. Kochhar Construction Work.)

11. It is clear from the observations of the Supreme Court found in paragraph 7 quoted above that the Supreme court has in clear terms held that the arbitral proceedings at the instance of unregistered firm are not maintainable in view of the mandatory provisions of Section 69 of the Indian Partnership Act and the judgment of the Supreme Court in the case of Jagdish Chandra Gupta. The position that emerges from the perusal of the judgments of the Supreme Court in the case of Firm Ashok Traders and in the case of U.P.State Sugar Corporation Ltd.is that where an application under Section 9 is filed in relation to an unregistered partnership firm the court will not be in a position to grant any interim order in favour of the applicant because arbitration proceedings themselves will not be maintainable because the firm is unregistered. So far as the submission of the learned Counsel for the Petitioner that efforts were made to get the firm registered

and because of action or inaction of the Respondents the firm has remained unregistered, is concerned, in my opinion, it is not relevant for considering the question whether the arbitral proceedings are maintainable or not.

12. Taking overall view of the matter, therefore, as in my opinion the arbitral proceedings themselves are not maintainable as the firm is not registered, the Petitioner would not be entitled to any interim order from this court. It is made clear that so far as the observations made above in relation to entitlement of the Petitioner to maintain the arbitration proceedings are concerned these are prima facie observations made only for the purpose of deciding the application filed under Section 9 of the Arbitration Act.

13. Petition disposed of.

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